IN THE UNITED STATED DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
(Northern Division)

JEFFREY M. YOUNG-BEY **Inmate Number: 307062,** **Plaintiff,** **v.** **WEXFORD MEDICAL SERVICES, INC.** **and** **RYAN BROWNEY,** **Defendants.**	**Civil Action No. 1:14-CV-02812-JFM**

DEFENDANTS WEXFORD HEALTH SOURCES, INC. AND RYAN BROWNING'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF THEIR MOTION TO DISMISS PLAINTIFF'S COMPLAINT

COME NOW Defendants Wexford Health Sources, Inc. and Ryan Browning (improperly identified as "Wexford Medical Services, Inc." and "Ryan Browney", respectively) (hereafter "Wexford" and "Browning", respectively, and "Defendants", collectively), by and through undersigned counsel, and hereby submit the following points and authorities in support of their Motion to Dismiss Plaintiff's Complaint.

I. Introduction

On September 4, 2014, Plaintiff filed the instant lawsuit against Wexford and Browning. Plaintiff is a convicted criminal serving time in the custody of the Maryland Department of Corrections. Plaintiff's Complaint is far ranging, alleging sixteen (16) causes of action. Specifically, Plaintiff asserts causes of action for intentional infliction of emotional distress, invasion of privacy – intrusion upon seclusion, invasion of privacy – unreasonable publicity, invasion of privacy – false light, illegal search and seizure, malicious interference with medical care, negligent hiring and retention, withholding prescribed medications, denial of medical needs/delaying medical treatments, negligent entrustment, medical malpractice, violation of the Maryland Declaration of Rights, malicious use of process and *respondeat superior* liability.

The substance of Plaintiff's allegations is that Browning, as the "pharmacy/dispensary clerk" at the Prison, and Wexford, as Browning's alleged employer, improperly withheld and/or delayed Plaintiff's medications, failed to order Plaintiff's medications, caused Plaintiff to be "subjected to an unreasonable search and seizure by police officials" and "has harassed and taunted the Plaintiff with homosexual entreaties." (Complaint, ¶ 14.)

Plaintiff's allegations are wholly conclusory and are comprised of bald assertions. Plaintiff also fails to set forth sufficient and necessary factual allegations to supports certain counts. Finally, this Court should decline to exercise jurisdiction over the state law claims. Accordingly, Plaintiff's Complaint must be dismissed in its entirety with prejudice.

II. Standard of Review

A court reviewing a Complaint in light of a Rule 12(b)(6) motion accepts all well-pled allegations of the Complaint as true and construes the facts and reasonable interferences derived there from in the light most favorable to the plaintiff. *Ibarra v. United States*, 120 F.3d 472 (4th Cir. 1997). Such a motion should be granted when "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). The Court, however, need not accept unsupported legal allegations, *Revene v. Charles County Comm'rs.*, 882 F.2d 870, 873 (4th Cir. 1989), or conclusory factual allegations devoid of any reference to actual events. *United Black Firefighters v. Hirst*, 604 F.2d 844, 847 (4th Cir. 1979). A "plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (citing *Panasan v. Allain*, 478 U.S. 265, 286 (1986) (on a motion to dismiss, courts "are not bound to accept as true a legal conclusion couched as a factual allegation")).

To survive a motion to dismiss a complaint must do more than tender "naked assertion[s]" devoid of "further factual enhancement." *Twombly,* 550 U.S. at 557; *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). The Supreme Court explained that a Complaint's allegations must be facially plausible, meaning the plaintiff must plead factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. *Twombly*, 550 U.S. at 556; *Iqbal*, 556 U.S. at 678. The plausibility standard requires more than a simple recitation of the elements of the cause of action; it requires a factual basis that takes the allegations beyond mere conceivability to plausibility. *Twombly*, 550 U.S. at 555; *Iqbal*, 556 U.S. at 678; *see also Walters v. McMahen*, 684 F.3d 435, 439 (4th Cir. 2012).

III. Argument

a. Plaintiff's Claim for Intentional Infliction of Emotional Distress Must Be Dismissed as Plaintiff Has Not Alleged Conduct by Defendants Which Was "Extreme and Outrageous" and Has Not Alleged Facts That His Ensuing "Emotional Distress" Was Severe.

Plaintiff's first cause of action is for Intentional Infliction of Emotional Distress (hereafter "IIED). It should be noted that IIED claims are "rarely viable in a case brought under Maryland law." *Robinson v. Cutchin*, 140 F. Supp 2d 488, 494 (D. Md. 2001). Further, the initial determination of whether elements of cause of actions for IIED have been satisfied rests with the trial judge and if the judge decides that reasonable men would not differ on any on of the elements, he/she is within his/her rights to grant a motion to dismiss for failure to state a claim upon which relief can be granted. *See Hamilton v. Ford Motor Co.*, 502 A.2d 1057, 1063 (Md. App. 1986).

In order for Plaintiff to sufficiently state a claim for relief under the theory of IIED, four factors must be properly pled: "(1) the conduct must be intentional and reckless; (2) the conduct must be extreme and outrageous; (3) there must be a causal connection between the wrongful conduct and the emotional distress; and (4) the emotional distress must be severe." *Harris v. Jones*, 380 A.2d 611, 614 (Md. 1977).

1. The Conduct Of Which Plaintiff Complains Is Not "Extreme and Outrageous".

The most important of these four factors is that the conduct complained of must be extreme and outrageous. The Maryland Court of Appeals has stated that:

> The extraordinary feature of the tort…is its insistence upon "extreme and outrageous conduct." ***In fact, this element is, in large respect, the entire tort***. It both limits the reach of the tort and dominates the proof of its elements. The outrageousness requirement means there is no liability simply for the intentional infliction of emotional distress. If a defendant intends to cause a plaintiff emotional distress and succeeds in doing so, the defendant is nonetheless not liable unless his or her conduct is also extreme and outrageous.

Kentucky Fried Chicken National Management Co. v. Weathersby, 607 A.2d 8, 11-12 (1992) (emphasis added.).

In the case at hand, Plaintiff alleges that the basis for his IIED claim is that he "was subject to sexual harassment by [Browning] and arbitrarily threatened Plaintiff with punitive and disciplinary action by abuse of the rules of the Department of Public Safety and Correctional Services." (Ex. 1, Complaint, ¶ 16.) Claims of "sexual harassment" and being threatened with "punitive and disciplinary action" do not rise to the level of "extreme and outrageous conduct" for an IIED claim. *See Beye v. Bureau of National Affairs*, 477 A.2d 1197, 1205 (Md. 1984) (sustaining dismissal of an IIED claim on the grounds that the allegation failed to establish extreme and outrageous conduct where Plaintiff alleged that for six years, his supervisor, among other things, "threatened to fire him, harassed him and physically assaulted him…"); *see also Thomas v.*

BET Sound-Stage Restaurant/Brettco, Inc., 61 F. Supp. 2d 448, 455 (D. Md. 1999) (holding that Maryland Courts refuse to find vulgar teasing, bad taste and poor judgment rise to the level of "extreme and outrageous" conduct.) Accordingly, Plaintiff's cause of action for IIED must be dismissed.

2. Plaintiff Has Not Alleged Facts That His "Emotional Distress" Was Severe.

The only damage claimed under the IIED claim is that "Plaintiff has suffered and will continue to suffer severe and extreme emotional distress." (Ex. 1, Complaint, ¶ 21.) Severe distress for an IIED claim is that which "no reasonable man could be expected to endure." *Harris v. Jones*, 380 A.2d 611, 616 (Md. 1977). This threshold is reached when a plaintiff's "emotional distress is so severe to have disrupted her ability to function on a daily basis." *Bryant v. Better Business Bureau*, 923 F. Supp. 720, 750 (D. Md. 1996).

Plaintiff's Complaint lacks any factual statements or allegations of the specific nature, intensity or duration of the alleged emotional injury. As such, Plaintiff has failed to allege a severely disabling emotional response required to go forward with an IIED claim. *See Manikhi v. Mass Transit Administration*, 758 A.2d 95, 114 (Md. 2000) (stating that the Amended Complaint fails to allege a severely disabling emotional response due to the failure to state with reasonable certainty the nature, intensity or duration of the alleged emotional injury.); *see also Moniodis v. Cook*, 494 A.2d 212, 219 (Md. Ct. Spec. App. 1985) (noting that "severity of emotional distress is measured by factors including the intensity of the response as well as its duration."); *Leese v. Baltimore County*, 497 A.2d 159, 174 (Md. App. 1985) (affirming dismissal for failure to state a claim when terminated employee's Complaint alleged that he suffered "physical pain, emotional suffering and great mental anguish" because these allegations fell "short of the 'evidentiary particulars' that must be pleaded to show a prima facie case of severe injury"). Accordingly, Plaintiff's cause of action for IIED must be dismissed.

b. Plaintiff's Multiple Claims for Invasion of Privacy Must Be Dismissed as Plaintiff Has Not Alleged Facts to Demonstrate That a Reasonable Expectation of Privacy Was Intruded Upon, That Any Search Conducted Was Highly Offensive or That There Was Any Publication of Private Information.

Plaintiff has filed three causes of action for invasion of privacy – (1) intrusion upon seclusion, (2) unreasonable publicity and (3) false light. (*See* Ex. 1, Complaint, pp. 7-10.) Two of these claims (intrusion upon seclusion and false light) center on Plaintiff's allegations that Browning falsely informed police officers that Plaintiff was in possession of dangerous substances. (*See id.*, ¶¶ 24-25 and 34.) Plaintiff's claim for unreasonable publicity deals with the allegations that Browning improperly publicized facts about the Plaintiff – i.e., that he was taking medications for chronic care and "other details contained in Plaintiff's private medical files." (*Id.*, ¶ 29.) Taking each one of these claims in turn, it is clear that Plaintiff has not properly pled these causes of action, thereby justifying dismissal.

1. Invasion of Privacy – Intrusion Upon Seclusion.

Plaintiff's second cause of action - for "invasion of privacy/intrusion upon seclusion" - is based on Plaintiff's claim that "[a]t approximately 12:30 p.m. on August 29, 2014, [Browning] falsely informed uniformed police officers that he had knowledge that the Plaintiff was illegally hoarding controlled dangerous substances…as a result Plaintiff was [sic] placed in handcuffs[,] arrested and searched in a public area and had his medicine confiscated." (*Id.*, ¶ 26.)

Under Maryland law, the tort of intrusion on seclusion is defined as "[t]he intentional intrusion upon the solitude or seclusion of another or his private affairs or concerns that would be highly offensive to a reasonable person." *Mitchell v. Balt. Sun Co.*, 883 A.2d 1008, 1022 (Md. Ct.

Spec. App. 2005). "[T]he gist of the offense is the intrusion into a private place or the invasion of a private seclusion that the plaintiff has thrown about his person or affairs." *Pemberton v. Bethlehem Steel Corp.*, 502 A.2d 1101, 1116 (Md. Ct. Spec. App. 1986). An actionable tort requires both that "the intrusion must be something which would be offensive or objectionable to a reasonable man," and that "the thing into which there is intrusion or prying must be, and be entitled to be, private." *Hollander v. Lubow*, 351 A.2d 421, 426 (Md. 1976).

Plaintiff's cause of action fails as there is not a reasonable expectation of privacy for a prisoner in controlling dangerous controlled substances in a prison. *See Thompson v. Souza*, 111 F.3d 694, 702-703 (9th Cir. 1997) (holding that a prisoner's Fourth Amendment rights were not violated as there is a legitimate penological interest in drug testing while balancing a prisoner's privacy expectations against the prisons interest in curbing the use and flow of drugs in the prison); *Hudson v. Palmer*, 468 U.S. 517, 525-26 (1984) (holding that a prisoner has no reasonable expectation of privacy, and thus is not entitled to Fourth Amendment protections, in his prison cell); *Bell v. Wolfish*, 441 U.S. 520, 558-60, 60 L. Ed. 2d 447, 99 S. Ct. 1861 (1979) (holding that routine strip searches of pretrial detainees that were not supported by probable cause were reasonable under the Fourth Amendment).

Even if a prisoner had a reasonable expectation of privacy in such conduct, a prisoner cannot establish, as a matter of law, that prison officers searching him for possession of dangerous controlled substances would be highly offensive to a reasonable person. *See e.g., Whye v. Concentra Health Servs.*, 2014 U.S. App. LEXIS 17478, *2-4 (4th Cir. Md. Sept. 10, 2014) (affirming the dismissal of the claim as there is no reasonable expectation to privacy in a person's breath nor is breath testing for alcohol highly offensive to a reasonable person.); *see also Faulkner v. Maryland*, 564 A.2d 785, 788 (Md. 1989) (rejecting employee's Fourth Amendment challenge to warrantless search of his workplace locker, conducted by employer in the presence of police, because company policy provided that management could search the locker upon suspicion of alcohol or drugs, and therefore employee lacked a privacy interest in the contents of the locker); *Am. Postal Workers Union v. U.S. Postal Serv.*, 871 F.2d 556, 560 (6th Cir. 1989) (concluding that employees had no reasonable expectation of privacy in lockers in light of employer's policies allowing locker inspections).

As such, Plaintiff has not alleged sufficient facts to proceed on the "invasion of privacy - intrusion upon seclusion claim" and, therefore, this cause of action must be dismissed.

2. Invasion of Privacy – Unreasonable Publicity.

Plaintiff's third cause of action - for "invasion of privacy/unreasonable publicity" - is based on Plaintiff's claim that Browning "improperly publicized facts about the Plaintiff, i.e. that the Plaintiff was taking a variety of medications for chronic care and other details contained in Plaintiff's private medical files." (Ex. 1, Complaint, ¶ 29.)

The elements of the offense are (1) publicity, (2) of private, not public, facts concerning another, (3) that are not of a legitimate concern to the public, and (4) are of a kind that is highly offensive to a reasonable person, considering the customs of the time and place. (*See* MPJI-Cv 25:3).

Plaintiff's claim for unreasonable publicity must be dismissed as he has failed to provide any specific factual allegation as to how his medical information was publicized and to whom it was publicized. For example, if Plaintiff's medical condition was discussed by Browning to another health care professional so as to treat Plaintiff, then the disclosure cannot be considered an invasion of privacy. Further, if the publication is made to a small group of people, it is likewise not actionable. *Henderson v. Claire's Stores, Inc.*, 607 F. Supp. 2d 725, 733 (D. Md.

2009) ("[I]t is not an invasion of privacy to communicate a fact about someone's private life to…a small group of people."), citing *Pemberton v. Bethlehem Steel Corp.*, 502 A.2d 1101, 1118 (Md. App. 1986). Therefore, specific facts of the publicity must be stated in the Complaint. Plaintiff's bald and conclusory allegation that facts were "improperly publicized" does not suffice. *See Bell Atlantic Corp. v. Twombly*, 127 S.Ct. 1955, 1965 (2007) ("a plaintiff's obligation to provide the grounds of his entitle[ment] to relief requires more than labels and conclusions."); *Conley v. Gibson,* 355 U.S. 41, 47 (1957) (Federal Rule 8 is intended to "give the defendant fair notice of what the...claim is and the grounds upon which it rests."). Accordingly, Plaintiff's third cause of action for "invasion of privacy – unreasonable publicity" - must be dismissed.

3. Invasion of Privacy – False Light

Plaintiff's fourth cause of action - for "invasion of privacy/false light" - is based on Plaintiff's claim that Browning allegedly publicized facts that Plaintiff had in his possession illegal controlled dangerous substances. (*See* Ex. 1, Complaint, ¶ 33.)

As with the unreasonable publicity claim discussed *supra*, the tort of false light is a type of an invasion of privacy that requires "publication which unreasonably places the plaintiff in a false light before the public." *Allen v. Bethlehem Steel Corp.*, 76 Md. App. 642, 648 (1988). The Maryland Court of Appeals in *Hollander v. Lubow*, stated: "[t]he disclosure of the private facts must be a public disclosure, and not a private one; there must be, in other words, publicity . . . ." 277 Md. 47, 57 (1976). And as discussed *supra*, Plaintiff fails to make any specific factual allegation as to how the publication that he possessed illegal controlled substances was made and to whom it was publicized. As such, specific facts of the publicity must be stated in the Complaint and Plaintiff's bald and conclusory allegation that facts were "improperly publicized" does not suffice. Accordingly, Plaintiff's fourth cause of action for "invasion of privacy/false light" must be dismissed.

c. Plaintiff's Claims for Illegal Search and Seizure and Violation of the Maryland Declaration of Rights Must Be Dismissed as There Is No Factual Basis for an Illegal Search, Nothing Was Alleged to Have Been Seized, Defendants Were Not State Actors, and if They Were, They Are Entitled to Qualified Immunity and There Is No Allegation of Joint Action Between the Defendants and the State.

Plaintiff's fifth cause of action for "illegal search and seizure" is based on Plaintiff's claim that Browning, acting under the color of Maryland law and in violation of 42 U.S.C. § 1983, "caused the Plaintiff to be arrested, subjected to a search of his person…" (Exhibit 1, Complaint, ¶ 43.) This claim is identical to Plaintiff's twelfth cause of action for violation of the Maryland Declaration of Rights as "Articles 24 and 26 of the Maryland Declaration of Rights are the state counterparts to the Due Process Clause and the Fourth Amendment of the United State Constitution, respectively." *Olukayode v. Balt. County*, 450 F. Supp. 2d 610, 618 (D. Md. 2006); (*See* Ex. 1, Complaint ¶¶ 84-89); *see also Franklin v. Montgomery County, M.D.*, 2006 U.S. Dist. LEXIS 68476, *17 (D. Md. Sept. 13, 2006) ("Article 24 protects substantive due process rights and Article 26 protects the right to be free from unreasonable searches and seizures, the statutes are construed *in pari materia* with the Fourteenth and Fourth Amendments of the United States Constitution respectively.").

As the Supreme Court has stated:

> The first clause of the Fourth Amendment provides that the 'right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated. . . .' This text protects two types of expectations, one involving 'searches,' and the other 'seizures.' A 'search' occurs when an expectation of privacy that society is prepared to consider reasonable is infringed. A 'seizure' of property occurs when there is some meaningful interference with an individual's possessory interest in that property. [The Supreme Court] has . . . consistently construed this protection as proscribing only governmental action; it is wholly inapplicable to a search or seizure, even an

> unreasonable one, effected by a private individual not acting as an agent of the Government. . . .

United States v. Jacobsen, 466 U.S. 109, 113 (1984). Accordingly, as stated *supra*, Plaintiff cannot prevail on his "illegal search and seizure claim" as there was no illegal search and there is no reasonable expectation of privacy that is infringed upon when a prisoner is searched for dangerous controlled substances, as stated *supra*. Further, Plaintiff fails to state a claim as he fails to allege that anything was actually seized from him.

Additionally, Defendants, as private citizens, cannot become state actors when they merely call upon law enforcement for assistance or provide information to police officers when the police officers rely on that information to effect an arrest. *See Polacek v. Kemper County*, 739 F. Supp. 2d 948, 953 (S.D. Miss. 2010); *Daniel v. Ferguson*, 839 F.2d 1124, 1130 (5th Cir. 1988); *Hooper v. Sachs*, 618 F. Supp. 963, 978 (D. Md. 1985) (stating that a private citizen furnishing information to the State which allegedly formed the basis for the State's prosecution does not form the basis for an illegal search and seizure claim.) Even if Defendants are considered state actors, which they are in *connection with the provision of healthcare in the prison system*, they are entitled to qualified immunity.

Qualified immunity protects government employees from being held liable for damages as long as their behavior "does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Private parties compelled by the government to undertake duties that would otherwise have to be performed by a public official are entitled to raise a qualified immunity defense. *Filarsky v. Delia*, 132 S.Ct. 1657, 1667-68 (2012).

In *Filarsky*, the Supreme Court overturned the denial of qualified immunity to an internal affairs investigator in Rialto, California, arguing for broad application of this doctrine because narrowly distinguishing among those who carry out the public's business deprives "state actors of the ability to 'reasonably anticipate when their conduct may give rise to liability for damages,' *Anderson v. Creighton*, 483 U.S. 635, 646 (1987)...frustrating the purposes immunity is meant to serve. An uncertain immunity is little better than no immunity at all." *Filarsky,* 132 S.Ct. at 1666.

Browning would have performed the alleged services for which he has been sued by Plaintiff through a contract between his employer, Wexford, and the Maryland Department of Public Safety and Correction Services ("DPSCS"). The Supreme Court has expressly deemed it unfair for non-government employees to face liability for conduct performed with government employees who are immunized. *Filarsky*, at 1666. The Supreme Court noted that ".... immunity under §1983 should not vary depending on whether an individual working for the government does so as a full-time employee, ***or on some other basis***." *Filarsky*, at 1665 (emphasis added). Exposing Defendants to liability herein would be both unjust and could deter doctors, physician assistant, nurses, and any other health care providers from providing services to prisoners. *Id.* at 1666.

The qualified immunity defense generally applies insofar as the actor's conduct "does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). To constitute a well-established constitutional right, "the contours of the right must be sufficiently clear that a reasonable official would understand what he is doing violates that right." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987).

As explained *infra*, the facts as pled do not suggest that Defendants treated Plaintiff with deliberate indifference to his medical care and with knowledge that they were violating some statutory or constitutional right of the plaintiff. Under these circumstances, Defendants are entitled to qualified immunity from suit by Plaintiff and Plaintiff's Complaint against them should be dismissed.

Finally, Plaintiff makes no allegations that the defendants, as private citizens, are liable under § 1983 on the basis of joint action with the prison police officers. In order to do this, Plaintiff would have needed to "allege facts showing an agreement or meeting of the minds between the state actor and the private actor to engage in a conspiracy to deprive the plaintiff of a constitutional right, and that the private actor was a willing participant in joint activity with the state or its agents." *Donley v. Hudson's Salvage, LLC*, 2011 U.S. Dist. LEXIS 136908, 54-55 (E.D. La. Nov. 29, 2011). Plaintiff fails to make any allegation that either of the defendants had an agreement with the prison police officers to engage in a conspiracy to deprive Plaintiff of a constitutional right. Accordingly, Plaintiff has failed to allege sufficient facts for his claims of illegal search and seizure and for violation of the Maryland Declaration of Rights, therefore, requiring dismissal of his Complaint.

d. Plaintiff's Claim for Negligent Hiring and Retention Must Be Dismissed as Plaintiff Fails to Set Forth Sufficient Factual Allegations to Proceed With the Claim.

Plaintiff's seventh cause of action for "negligent hiring and retention" is based on Plaintiff's claim that "on or after January 2010," Wexford hired Browning and "assigned him to the duty of dispensing prescription medications…" (Ex. 1, Complaint, ¶ 51.) Further, Plaintiff claims that Wexford was advised of Browning's criminal record and history of complaints, "which amount to prior acts of misconduct, patient abuse, sexual harassment, false claim and misrepresentation." (*Id.*) Plaintiff also claims that Browning interfered with and discontinued dispensing medication to Plaintiff, to which Plaintiff claims Wexford had prior knowledge of.

(*See id.*) Plaintiff also alleges that Wexford allegedly had knowledge of Browning's history of sexual harassment and his alleged prior history of interfering with patients medications. (*See id.* at ¶ 54.)

Plaintiff's allegations for this cause of action do little more than narrate the elements of negligent hiring, training and retention. Additionally, Plaintiff fails to provide any specific factual support to his claims of Browning's purported "prior acts of misconduct, patient abuse, sexual harassment, false claim and misrepresentation." (Ex. 1, Complaint, ¶ 51.) Similarly, there are no specific facts pled as to when or how Wexford supposedly knew of Browning's claimed prior refusal to dispense medication, sexual harassment and interference with patient's medication. These are threadbare and conclusory allegations devoid of any reference to actual events, which justify dismissal of this count. *See United Black Firefighters v. Hirst*, 604 F.2d 844, 847 (4th Cir. 1979) (holding that dismissal was proper as conclusory allegations of discrimination were not supported by any reference to particular acts, practices, or policies of the Fire Department.)

e. Plaintiff's Claims for Withholding Prescribed Medications and Denial of Medical Needs/Delaying Medical Treatments Must Be Dismissed as the Medical Treatment Rendered by Defendants Did Not "Shock the Conscience" or "Offend the Evolving Standards of Decency", Plaintiff Has Not Alleged That Defendants Had a Culpable State of Mind and Plaintiff Has Not Alleged Any Specific Injury.

Plaintiff's eighth cause of action, for "withholding prescribed medications", alleges that Wexford and Browning, while acting under state law, failed to provide treatment for Plaintiff's medical needs. (*See* Ex. 1, Complaint, ¶¶ 60-63.) Plaintiff's ninth cause of action, for "denial of medical needs/delaying medical treatments," alleges that Browning, solely, while acting under state law repeatedly delayed in providing Plaintiff serious medications." (*See* Ex. 1, Complaint, ¶¶ 60-63, 66-68.) Both causes of action allege that Wexford and/or Browning acted with deliberate indifference to Plaintiff's medical needs, thereby causing him injuries and, therefore, legal analysis of both of the causes of action are the same. (*See id.*, ¶¶ 61 and 69.)

Deliberate indifference to a prisoner's serious medical needs states an Eighth Amendment claim. *Estelle v. Gamble*, 429 U.S. 97, 104 (1976). To prove that prison conditions violate the Eighth Amendment, a prisoner must show both "(1) a serious deprivation of a basic human need; and (2) deliberate indifference to prison conditions on the part of prison officials." *Williams v. Griffin*, 952 F.2d 820, 824 (4th Cir. 1991). The first element requires the Court to determine whether the deprivation was objectively serious enough, and the second dictates that it determine whether the officials subjectively acted with the required culpable state of mind. *Strickler v. Waters*, 989 F.2d 1375, 1379 (4th Cir. 1993).

In evaluating the first element, courts must consider the severity of the medical problem, the potential for harm if medical care was denied or delayed, and whether such harm actually resulted from the lack of medical attention. *Burns. v. Head Jailor of La Salle County Jail*, 576 F. Supp. 618, 620 (N.D. Ill. 1984). With respect to the second element of a violation, "the requisite state of mind may be manifested by the officials' response to an inmate's known needs or by denial, delay, or interference with prescribed health care." *DesRosiers v. Moran*, 949 F.2d 15, 19 (1st Cir. 1991), citing *Estelle*, 429 U.S. at 104-05. The treatment rendered "must be so grossly incompetent, inadequate, or excessive as to shock the conscience or to be intolerable to fundamental fairness." *Miltier v. Beorn*, 896 F.2d 848, 851 (4th Cir. 1990). Actual intent or reckless disregard may constitute deliberate indifference. *Id.* Recklessness occurs when a defendant "disregard[s] a substantial risk of danger that is either known to the defendant or which would be apparent to a reasonable person in the defendant's position." *Id.* at 851-852. Mere negligence or questions of medical judgment, however, does not violate the Eighth

Amendment. *Estelle,* 429 U.S. at 106; *see also Miltier*, 896 F.2d at 85. Further, "[v]arious incident of delays without more….does not establish a basis for an Eighth Amendment claim as there is no expectation that prisoner will received unqualified access to medical care or medical care the prisoner deems necessary or desirable." *White v. Corizon, Inc.*, 2014 U.S. Dist. LEXIS 62874, *11 (D. Md. May 7, 2014).

1. Plaintiff's Eighth Amendment Claims Should be Dismissed as a Matter of Law because the Medical Treatment Rendered by Defendants Did Not "Shock the Conscience" or "Offend the Evolving Standards of Decency".

Plaintiff has failed to properly allege that Defendants failed to provide him medical treatment as he fails to state the medical treatment he required and what the medical treatment was for. Without alleging these basic facts, it is impossible for Plaintiff to satisfy the standard that such treatment "shock the conscience" or "offend the evolving standards of decency." Accordingly, Plaintiff's claim must be dismissed for failure to state a claim.

2. Plaintiff's Eighth Amendment Claims Should be Dismissed as a Matter of Law Because Defendants Did Not Have a Culpable State of Mind.

Plaintiff also must show that the defendants had a culpable state of mind. Plaintiff, however, fails to provide any averments in his Complaint concerning whether Defendants knew that Plaintiff was exposed to a substantial risk of harm and yet deliberately failed to take appropriate action. The United States Supreme Court in *Farmer v. Brennan*, 511 U.S. 1970 (1994), defined deliberate indifference to require a showing that prison staff were "subjectively" aware of a substantial risk of harm to the prisoner:

> We reject [the] invitation to adopt an objective test for deliberate indifference. We hold… that a prison official cannot be found liable under the Eighth Amendment for denying an inmate humane conditions of confinement unless the official knows of and disregards an excessive risk to inmate health or safety… ***The official must be both aware***

> ***of facts from which the inference can be drawn that a substantial risk of serious harm exists, and he must also draw the inference.***

Id., 114 S.Ct. at 1979. (emphasis added).

Therefore, to establish a cause of action of cruel and unusual punishment due to deliberate indifference, pursuant to 42 U.S.C. § 1983, the Eighth Amendment, or Article 26, Plaintiff must allege that Defendants knew of a substantial risk of harm to him, but refused to act anyway.

Plaintiff's Complaint is devoid of any contention, much less the necessary specific factual allegations, that Defendants were aware of Plaintiff's risk of injury, but refused to act. Based on the foregoing, Plaintiff's Eighth Amendment claims fail as a matter of law because Plaintiff failed to show that Defendants had a culpable state of mind.

3. Plaintiff's Eighth Amendment Claims Should be Dismissed as a Matter of Law Because Plaintiff Did Not Allege Any Specific Injury.

Plaintiff fails to allege any specific injury he sustained as a result of not receiving his medical treatment. In making a claim for relief, a pleading must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). The Supreme Court has held that "a plaintiff's obligation to provide the grounds of his entitle[ment] to relief requires more than labels and conclusions." *Bell Atlantic Corp. v. Twombly*, 127 S.Ct. 1955, 1965 (2007). Federal Rule 8 is intended to "give the defendant fair notice of what the...claim is and the grounds upon which it rests." *Conley v. Gibson,* 355 U.S. 41, 47 (1957).

Plaintiff's only claim regarding damages is that he "suffered and will incur future damages as a direct and proximate cause of the Defendants' acts, errors and omissions." (Ex. 1, Complaint, ¶¶ 64 and 70.) Hence, Plaintiff has merely provided a label and has not given Defendants the requisite fair notice of what damages he claims and the grounds upon which it rests. Therefore, Plaintiff's Eighth Amendment claim is deficient pursuant to Federal Rule 8 and must be dismissed for failure to state a claim upon which relief may be granted.

f. Plaintiff's Claim for Negligent Entrustment Must Be Dismissed as Plaintiff Has Failed to Allege That Wexford Was a "Supplier" of "Chattel", and Plaintiff Has Failed to Provide Sufficient Factual Allegations of Wexford's Knowledge and of His Damages.

Plaintiff's tenth cause of action is for "negligent entrustment." Plaintiff claims that Wexford failed to investigate prior complaints against Browning for refusing and delaying to dispense medications, prior claims of sexual harassment and whether he was fit and competent to perform his job. (*See* Ex. 1, Complaint, ¶¶ 72-74.)

The elements of a claim for negligent entrustment are:

(1) The making available to another a chattel which the supplier;

(2) knows or should have known the user is likely to use in a manner involving risk of physical harm to others; and

(3) the supplier should expect to be endangered by its use.

Mackey v. Dorsey, 655 A.2d 1333, 1337 (Md. App. 1995). "The principal feature of this tort is the knowledge of the supplier concerning the likelihood of the person to whom he entrusts the chattel to use it in a dangerous manner." *Id.* at 1337-38.

In the case at hand, Plaintiff has failed to allege that Wexford was a "supplier", that Wexford provided Browning with "chattel" or that Browning used "chattel" to harm Plaintiff. Further, as this cause of action relates solely to the provision of chattel, claims relating to allegation of sexual harassment are irrelevant.

To the extent this Court determines that medications qualify as "chattel", Plaintiff has only provided conclusory and bald allegations that Wexford knew or should have known that Browning would use the medications in a manner to cause physical harm to Plaintiff. As stated *supra*, Federal Rule 8 is intended to "give the defendant fair notice of what the...claim is and the grounds upon which it rests." *Conley v. Gibson,* 355 U.S. 41, 47 (1957).

Further, Plaintiff's only claim regarding damages is that he suffered injury. (*See* Ex. 1, Complaint, ¶ 78.) Hence, Plaintiff has merely provided a label and has not given Defendants the requisite fair notice of what damages he claims and the grounds upon which it rests. Therefore, Plaintiff's claim for negligent entrustment must be dismissed for failure to state a claim upon which relief may be granted.

g. Plaintiff's Medical Malpractice Claims Must Be Dismissed as Plaintiff Failed to Follow Any of the Provisions of the Healthcare Malpractice Act, Which Denies This Court the Necessary Subject Matter Jurisdiction Over a Cause of Action for Medical Negligence.

Plaintiff's sixth cause of action (malicious interference with medical care), seventh cause of action (negligent hiring and retention), eighth cause of action (withholding prescribed medications), ninth cause of action (denial of medical needs/delaying medical treatments), tenth cause of action (negligent entrustment), and eleventh cause of action (medical malpractice) are all based on the claim that Defendants, as health care providers, failed to provide medications to Plaintiff. The Fourth Circuit has held that ". . . negligent medical diagnoses or treatment, without more, does not constitute deliberate indifference" and "mere negligence or malpractice does not violate the eighth amendment." *Webb v. Hamidullah*, 281 Fed. Appx. 159, 165-166 (4th Cir. 2008), and *Miltier v. Beorn*, 896 F.2d 848, 852 (4th Cir. 1990). As such, Plaintiff's medical malpractice claims (counts 6-11) must be dismissed as he has failed to satisfy the conditions precedent to bringing a medical negligence action before any court in Maryland.

The Maryland legislature has fashioned a mandatory framework for the resolution of all health claims. *See Attorney General v. Johnson*, 385 A.2d 57 (Md. 1978); *see also* Md. Code § 3-2A-02(a)(1) (stating that all claims, suits, and actions brought by a person against a healthcare provider for medical injury allegedly suffered by the person, in which damages of more than the limit of the concurrent jurisdiction of the District Court are sought are governed by the provisions of Md. Code § 3-2A-01, *et seq*.). The Act unequivocally provides for the exclusiveness of its procedures. *See* Md. Code § 3-2A-02(a) (stating that a health claims action "may not be brought or pursued in any court of this State except in accordance with this subtitle."); *see also Oxtoby v. McGowan*, 2447 A.2d 860, 864-865 (Md. 1982) (noting that the Health Care Malpractice Claims Act creates a condition precedent to the institution of a court action).

Therefore, in order to maintain a suit for medical negligence, Plaintiff was required to initially file his claim with the Director of the Healthcare Alternative Dispute Resolution Office (hereafter "HCADRO"). *See* Md. Code § 3-2A-04(a). If, at that point, Plaintiff wished to further proceed with his cases there and/or request a transfer to a Maryland Circuit Court or United States District Court, he was required to file a Certificate of Qualified Expert and supporting expert report with the HCADRO. Only then would he have been permitted to file with the Director of the HCADRO a written election to waive arbitration. *See* Md. Code § 3-2A-06B(b)(1). Plaintiff would then have only been permitted to file the instant lawsuit within sixty (60) days after the Director signed an Order of Transfer. *See* Md. Code § 3-2A-06(B)(f)(1).

In this case, Plaintiff failed to follow any of the provisions of the Healthcare Malpractice Act, which denies this Court the necessary subject matter jurisdiction over a cause of action for medical negligence.[1] Therefore, to the extent that Plaintiff is attempting to assert a claim for medical negligence as in counts 6-11, such causes of action must be dismissed as a matter of law.

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[1] Defendants' counsel spoke with the Healthcare Alternative Dispute Resolutions Office and confirmed that Plaintiff has not filed his claim with this office. Defendants request that the Court take judicial notice of this fact.

h. Plaintiff's Claim for Malicious Use of Process Must Be Dismissed as Plaintiff Has Failed to Identify With Any Specificity the Exact Civil or Criminal Proceeding That Was Instituted Against Him by Browning and Plaintiff Has Failed to Allege That Any Proceeding That Was Instituted Against Him Was Terminated in His Favor.

Plaintiff's thirteenth cause of action is for "malicious use of process." The factual basis for this claim is that Browning allegedly "instituted a civil and criminal action against the Plaintiff when Defendants knew or should have known that Defendants actions would result in the Plaintiff being subjected to false arrest, search and seizure." (Ex. 1, Complaint, ¶ 91.)

In Maryland, the term "malicious use of process" means malicious prosecution of a civil claim. *One Thousand Fleet Ltd. P'shp. v. Guerriero*, 694 A.2d 952, 955 (Md. 1997). "Malicious prosecution" in Maryland applies to criminal charges, but otherwise shares the same elements as malicious use of process. *Id.*

To state a claim for malicious use of process (or malicious prosecution), a plaintiff must prove five elements. *Id.* at 956. First, the defendant must have instituted a prior civil (or criminal) proceeding. *Id.* Second, the prior proceeding must have been instituted without probable cause. *Id.* Third, defendant must have instituted the prior proceeding with malice, meaning the party was "actuated by an improper motive." *Id.*, citing *Keys v. Chrysler Credit Corp.*, 494 A.2d 200, 205 (Md. 1985). Fourth, the proceedings must have terminated in favor of the plaintiff. *One Thousand Fleet*, 694 A.2d at 956, citing *Berman v. Karvounis*, 518 A.2d 726, 729 (Md. 1987). Fifth, the plaintiff must establish her damages were inflicted by arrest, imprisonment, seizure of property, or other special injury that would not necessarily result in all suits prosecuted to recover for a like cause of action. *Id.*, citing *Keys*, 494 A.2d at 205; *Owens v. Graetzel*, 132 A. 265, 267 (Md. 1926). The absence of any element is fatal to the claim. *Herring v. Citizens Bank & Trust Co.*, 321 A.2d 182, 195 (Md. 1974).

Plaintiff's claim must be dismissed as a matter of law as he has failed to identify with any specificity the exact civil or criminal proceeding that was instituted against him by Browning. In fact, Browning and Wexford has never instituted a civil or criminal proceeding against Plaintiff. Further, Plaintiff fails to allege that either the alleged civil or criminal proceeding that was instituted against him was terminated in his favor.

As Plaintiff has not properly set forth all of the elements for his malicious use of process/malicious prosecution claim, it must be dismissed.

i. Plaintiff's Claim for *Respondeat Superior* Must Be Dismissed as It Is Not a Separate Cause of Action and Any Such Theory of Liability Is Inapplicable to 42 U.S.C. § 1983 Claims.

The fourteenth cause of action in Plaintiff's Complaint is that of *respondeat superior*. (*See* Ex. 1, Complaint, p. 26.) *Respondeat superior* is a theory of liability, not an independent cause of action. *Mason v. Bd. of Educ.*, 2011 U.S. Dist. LEXIS 2463 at *2 n.3 (D. Md. Jan. 11, 2011). To the extent that Plaintiff is attempting to assert vicarious liability upon Wexford for Browning's alleged action to cause Plaintiff to be subject to arrest, search and seizure, such claim must be dismissed. It is well settled that there is no vicarious liability for § 1983 claims based merely on the employer-employee relationship. *See Love-Lane v. Martin*, 355 F. 3d 766, 782 (4th Cir. 2004); *Iskander v. Village of Forest Park*, 690 F.2d 126, 128 (7th Cir. 1982); *Crenshaw v. City of East Chicago*, 2008 U.S. Dist. LEXIS 48325, *31 (N.D. Ind. 2008) ("It is well-settled that a private employer may not be held vicariously liable under 42 U.S.C. § 1983 for deprivation of others' civil rights caused by its employees."); *Harvey v. Harvey*, 949 F.2d 1127, 1129-30 (11th Cir. 1992); *Sanders v. Sears, Roebuck & Co.*, 984 F.2d 972, 975-76 (8th Cir. 1993); *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989).

Liability for such actions only attaches to private persons or entities when they are "jointly engaged with state officials in the challenged action" are they then "acting 'under color' of law for purposes of 42 U.S.C. § 1983 actions." *Dennis v. Sparks*, 449 U.S. 24, 27-28 (1980).

In other words, the private entity must be a "willful participant in joint action with the State or its agents." *Id.* at 27. To succeed under a "joint action" theory, the plaintiff must establish the existence of a conspiracy, or an agreement on a joint course of action in which the private party and the State have a common goal. *See Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 152 (1970). In order to establish the existence of a conspiracy, a plaintiff must show that the state actor and the private entity "reached an understanding" to deprive him of his constitutional rights. *See Moore v. Marketplace Restaurant, Inc.*, 754 F.2d 1336, 1352 (7th Cir. 1985).

Plaintiff has failed to allege in the Complaint that Wexford participated with the State of Maryland or prison officials in a conspiracy and had a common goal. Nor has Plaintiff made any allegation that Wexford and the State of Maryland or prison officials reached an understanding to deprive Plaintiff of his constitutional rights.

Accordingly, Plaintiff's fourteenth cause of action for "*respondeat superior* liability" must be dismissed as a matter of law.

j. Plaintiff's State Law Claims Should Be Dismissed Due To Lack of Subject Matter Jurisdiction.

Federal courts are courts of limited subject matter jurisdiction. This Court's jurisdiction over Plaintiff's claims are based on federal question jurisdiction, 28 U.S.C. § 1331, and this Court has supplemental jurisdiction over his state law claim pursuant to the Court's authority under 28 U.S.C. § 1367. This Court can decline to exercise supplemental jurisdiction when the Court "dismiss[es] all claims over which it has original jurisdiction." U.S.C. § 1367 (c)(3). As noted above, Plaintiff's federal claims should be dismissed. Therefore, Plaintiff's state law claims would be the only remaining claim before this Court. Those claims are the IIED claim, invasion of privacy claims (causes of action 2-4), medical malpractice claims (causes of action 6-11), violation of the Maryland Declaration of Rights claim, (causes of action 1-3), and malicious use of process claim. As such, the Court should decline to exercise jurisdiction over this state law claims for that reason alone.

IV. CONCLUSION

WHEREFORE, for the reasons set forth above, Defendants Wexford Health Sources, Inc. and Ryan Browning request that the Court grant this Motion and dismiss Plaintiff's Complaint with prejudice.

Respectfully submitted,

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